UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF VIRGINIA.

VIRGINIA & WEST VIRGINIA COAL CO. *v.* GREEN CHARLES.

July 14, 1917.

1. Acknowledgment—Authority to Take—Commissioners in Chancery.—Commissioners in chancery of the county courts had in the year 1883 authority to take and certify acknowledgments of deeds, notwithstanding the fact that the Act of April 2, 1873, abolished the equity jurisdiction of those courts.

[Ed. Note.—For other cases, see 1 Va.-W. Va. Enc. Dig. 107, 108.]

2. Acknowledgment—Certificate—Sufficiency.—A deed which shows on its face that it was executed by the grantors in their capacity as executors is valid and admissible to record, although signed and acknowledged as if the grantors had been acting in their individual personal right.

[Ed. Note.—For other cases, see 1 Va.-W. Va. Enc. Dig. 114.]

3. Depositions—Admissibility in Evidence.—Contrary to the general rule, a deposition of a witness now dead, taken in a suit between strangers, if tending to prove ancient possession of land, is admissible in evidence.

[Ed. Note.—For other cases, see 4 Va.-W. Va. Enc. Dig. 577.]

4. Statutes—Construction and Operation.—Act of March 13, 1912 (Acts 1912, p. 524) was absolutely repealed by Act March 14, 1914 (Acts 1914, p. 186) even as to one who purchased a claim under an ancient tax deed while the Act of 1912 was in force, and section 6 Code 1904 does not save the benefit of the Act of 1912.

5. Constitutional Law—Repeal of Evidence Statute.—A statute which charges the common-law rule as to the burden of proof may be constitutionally repealed, and the common-law rule thereby restored, although the party asserting the unconstitutionality of the repealing statute acquired its claim to the land in controversy while the repealed statute was still in force.

[Ed. Note.—For other cases, see 3 Va.-W. Va. Enc. Dig. 222.]

6. Adverse Possession—Bar to Tax Purchaser.—Actual possession of a tract of land creates a constructive possession of another tract which is the last of a chain or series of adjoining tracts. Levy of taxes against senior title holder, followed by sale to the Commonwealth and subsequent sale for taxes to a stranger, does not prevent junior title holder's constructive adversary possession of interlock from ripening and barring action by tax purchaser of the senior title.

[Ed. Note.—For other cases, see 1 Va.-W. Va. Enc. Dig. 209, 224.]

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E. M. Fulton, of Wise, Va., *Chase & Dougherty,* of Clint-

wood, Va., *Wm. H. Werth, Greever, Gillespie & Divine, A. S. Higginbotham, Geo. C. Perry,* and *Geo. W. St. Clair,* of Tazewell, Va., *John A. Buchanan,* of Emory, Va., *Geo. E. Penn, Jr.,* of Abingdon, Va., *Jas. T. Strother,* of Bluefield, W. Va., *C. C. Burns* and *J. H. Stinson,* of Lebanon, Va., for defendant in error.

EXCERPTS FROM OPINION.

MeDowell, District Judge: This action of ejectment, which by agreement involves only one of several tracts of land claimed by the defendant, is a branch of an action brought by the plaintiff against Fairmount-Buchanan Company and some twelve hundred and fifty other defendants. And the main action is one of seventeen similar actions of ejectment brought in this court at or about the same time by the same plaintiff against some hundred and seventy odd additional defendants. The trial of the case was by stipulation held before the court without a jury.

PLAINTIFF'S CHAIN OF TITLE.

The muniments of the plaintiff's title were in the main introduced in the reverse of the order in which the title accrued. A list of the chief documents in the chains of title, in the order of their dates, may aid in an understanding of the questions to be considered:

(1) Patent, Nov. 16, 1795, from State of Virginia to Richard Smyth and Henry Banks.

(2) Tax Deed, Nov. 3, 1823, Taylor, Collector, to Wm. Lamb.

(3) Will of Wm. Lamb, March 5, 1827.

(4) Deed, Aug. 30, 1833, Lamb's Executors to Joseph Hagan and Sarah Purcell.

(5) Deed, Feby. 7, 1839, Sarah Purcell to James Culbertson.

(6) Record, 1856, Joseph Hagan *v.* James Culbertson.

(7) Deed, Oct. 6, 1857, Morison, Commissioner, to Joseph Hagan.

(8) Deed, April 4, 1871, Joseph Hagan to Patrick Hagan.

(9) Deed, Nov. 8, 1883, Patrick Hagan to Frederick Pearson.

(10) Tax Deed, Feby. 17, 1905, Dennis, Clerk, to Buchanan Company.

(11) Deeds from Buchanan Company et al. to Va. & West Va. Coal Co.

THE DEFENDANT'S CHAIN OF TITLE.

(1) Patent, May 1, 1861, State of Virginia to Silas Ratcliff.

(2) Deed, Dec. 8, 1896, Ratcliff's heirs to Margaret Justice.

(3) Deed, May 24, 1910, Jno. W. and Margaret Justice to Green Charles.

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(1) In the plaintiff's chain of title is a deed from Patrick Hagan et ux. to Frederick Pearson, dated Nov. 8, 1883. This deed was acknowledged on the day of its execution before one Osborne, a commissioner in chancery of the county court of Scott County, Virginia. Objection was made to the certified copy offered in evidence on the ground that the deed was not acknowledged before an officer authorized to take acknowledgments. This objection is based on the suppositon that the statute of April 2nd, 1873 (Acts 1872-3, p. 382), which abolished the equity of jurisdiction of the county courts, ipso facto destroyed the office of commissioner in chancery of the county courts. The acknowledgment in question was certified on Nov. 8th, 1883. By the Act of June 17th, 1870, (Acts 1869-70, p. 174) "commissioners in chancery of a court of record" were authorized to take and certify acknowledgments. This power has never been withdrawn (Code 1904, sec. 2501), and it appears that the power of the county courts (which were courts of record) to appoint commissioners in chancery was not withdrawn until the Code of 1887 (§ 3319) took effect. In Code 1860, p. 720, ch. 175, § 2, is the following: "Each court may, from time to time, appoint commissioners in chancery, or for stating accounts, who shall be removable at its pleasure; there shall not be more than three such commissioners in office at the same time for the same court." In Acts 1871-2, p. 466, is the same provision, in effect. In Code 1873, p. 1103, it is provided: "Each court shall, from time to time, appoint commissioners in chancery, or for stating accounts, who shall be removable at pleasure * * *." This same language is used in the Act of March 29, 1875—after the chancery jurisdiction had been taken from the county courts—(Acts 1874-5, p. 366); and also in Act of January 3, 1876, (Acts 1875-6, p. 7); Act of Dec. 29, 1877, (Acts 1877-8, p. 6); Act of January 14, 1879, (Acts 1878-9, p. 21); and Act of March 6, 1886, (Acts 1885-6, p. 544). See also Act of July 11, 1870, (Acts 1869-70, p. 442) which reads: "The judge of each court having jurisdiction of the probate of wills and granting administration in the state, shall designate *one of its commissioners in chancery*, who shall be known as the commissioner of accounts * * *." This statute, so far as I have discovered, remained in force until the Code 1887 was adopted. See sec. 2671, Code 1887. As the County Court of Scott County had the power to appoint James B. Osborne a commissioner in chancery and as such commissioner had power to take and certify acknowledgments of deeds

in 1883, this objection was properly overruled, even without reference to the curative act of March 5, 1900, (Acts 1899-1900, p. 851). No evidence that Osborne was then a commissioner was necessary. Smith *v.* Chapman, 10 Gratt. 445, 452-3. The doubt that gave rise to that statute was it seems not well founded. See also Acts 1901-2, p. 43; sec. 2501-a, Code 1904.

The original deed was recorded in Buchanan County in Deed Book 6, p. 147, on Nov. 12th, 1883. The copy offered in evidence was taken from Deed Book "L," p. 418. This last record appears to have been made January 9th, 1894, from the original deed. Under § 3339 Code 1904 there seems to be no ground on which to question the admissibility of the copy offered.

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(2) The plaintiff also offered a certified copy of a deed from Lamb's Executors to Joseph Hagan and Sarah Purcell.

(A) The first objection to this deed is that the grantors did not add to their signatures anything to indicate that they signed as executors. The deed begins: "This indenture made * * * between William P. Thompson and Bernard Hagan, * * * executors of the last will and testament of William Lamb, deceased, of the one part, and Joseph Hagan and Sarah Purcell, * * *, of the other part." It contains a recital that the sale of the land was in pursuance of the authority vested in the parties of the first part by the said will; also a recital that the court directed Bernard Hagan to unite with his co-executor in conveying the title as it was *vested in the said executors by the said will.* The granting clause reads: "that the said William P. Thompson and Bernard Hagan, *executors as aforesaid,* by these presents *do grant* * * * *and convey*" etc. The warranty also is against all persons claiming under the grantors "as executors as aforesaid." The intention of the grantors in this deed is so manifest, that I can think of no reason for holding that it is not the deed of the executors. It would have been more in accordance with modern practice had the word "Executor" been added to each signature, but such addition was I think unnecessary. The intent of the parties is the controlling principle in construing deeds, and I think this principle should apply in this case. In a digest note of the case of Kingsburg *v.* Wild, 3 New Hampshire, 30, it is said: "An administrator's deed to land sold under an order of the probate court need not be signed by him as administrator, especially if the capacity in which he conveys appears in any other part of the deed." 22 Cent. Dig. 2180. See also 16 Cent. Dig. 67; Hefferman *v.* Harvey, 41 West Va. 766; Boggess *v.* Scott, 48 West Va. 322.

This objection was properly overruled in so far as this ground of objection is concerned.

(B) The second objection is that the deed does not appear to have been properly acknowledged. The particulars of this objection are not given. No Virginia authority has been cited and I have found none. I am unable to find the slightest flaw in the certificate, as it seems to conform entirely to I Rev. Code 1819, p. 363, § 7; unless it be that the certificate does not state that the grantors acknowledged the deed to be their act and deed *as executors*. But this again was unnecessary. The certificate follows verbatim the form given in the statutes. The purpose of the acknowledgment and the official certificate thereof is to prevent fraud and mistake. Its essence is the admission by the person who executes the instrument to which the certificate is appended that such instrument is *his act*. To put into the mere certificate of acknowledgment, in addition to the full statement in the deed, a statement of the capacity in which the grantor acted in executing the instrument would seem to be as unnecessary as to insert therein a statement of the authority under which he acted. In 1 Corpus Juris. p. 848, § 191, it is said: "Acknowledgment by agent or attorney: A certificate of acknowledgment by an agent or attorney must show that it was made by such agent or attorney in behalf of the principal; but no particular set of words is necessary, in the evidence of express statutory requirement, to show that he made the acknowledgment in his representative and not his private capacity. If that fact can be gathered from a consideration of the certificate in connection with the deed it is enough." While perhaps the amendment of sections 2500 and 2501 found in Acts 1895-6, p. 452, may not be retroactive; still, if not, I know of no good reason for holding it to be anything but declaratory of the pre-existing rule. This statute reads in part: "Where any such writing purports to have been signed * * * in any representative capacity whatsoever, the certificate of acknowledgment * * * shall be sufficient * * * without expressing that such acknowledgment was * * * in a representative capacity."

This objection was, I think, properly overruled in so far as this point is concerned.

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(3) In 1878 Frederick Pearson instituted numerous ejectment suits in this court at Abingdon, which were eventually dismissed by the plaintiff without trial. In one of these causes, Pearson *v.* Fuller, sundry depositons were taken in behalf of the plaintiff therein in 1883 and these depositions were offered by the present plaintiff in the case at bar:

The defendant is not in privity with either Pearson or Furler. The general rule prevailing in this state is that depositions taken in a former suit can not be read as evidence in a subsequent suit unless there be substantial identity both of parties and issues. Rowe *v.* Smith, 1 Call. 487, 489; Paynes *v.* Coles. 1 Munf. 373, 394; Sheppards *v.* Turpin, 3 Gratt. 357, 372; Brown *v.* Johnson, 13 Gratt. 644, 649; Reed *v.* Gold, 102 Va. 37, 50. See also 1 Greenleaf Ev. (14th Ed.) §§ 163, 164; 6 Encyc. Pl. & Pr. 579; 7 Standard Procedure, 402; 2 Wigmore Ev. § 1386; 1 Starkie Ev. (7th Am. Ed.) 311 et seq.

Whether or not this general rule should apply will be best considered by taking up the depositions in detail.

EXHIBITS 55 AND 56.

These are depositions of Samuel Culberson. The deponent is dead and his alleged tenant, Edward Collins, is dead. The possession sought to be proved by these depositions is probably to be classed as ancient. Culbertson was not cross-examined, but he was under oath. On the whole I am of opinion that these two depositions were properly admitted. The subject is governed by the Virginia law (Clement *v.* Packer, 125 U. S. 309, 322), but I have found no decision quite in point. As a matter of general law the authorities are in conflict (2 Wigmore Ev. p. 1941, note 9), but apparently, without attempting a full investigation, the weight of general authority supports the admissibility of Culbertson's depositions. 16 Cyc. 1121, Bogardus *v.* Trinity Church, 4 Sandf. Chcy. 633, 724, 7 N. Y. Chcy. Repts. 1235, 1268; 1 Rice Ev. p. 409. In Fourth Nat'l. Bank *v.* Albaugh, 188 U. S. 734, 737, Mr. Justice Holmes used the following language: "In these days when the whole tendency of decisions and legislation is to enlarge the admissibility of hearsay where hearsay must be admitted or a failure of justice occur, we are not inclined to narrow the lines." In Richards *v.* Elwell, 48 Pa. St. 361, 367, it is said: "There is a time when the rules of evidence must be relaxed. We can not summon witnesses from the grave, rake memory from its ashes, or give freshness and vigor to the dull and torpid brain."

It should be noted that I am here dealing only with the admissibility of these depositions. The effect to be given the testimony will be considered elsewhere in this opinion.

EXHIBIT 57.

This deposition by Enoch Young I hold for the same reason to be admissible as evidence tending, although slightly, to prove an ancient possession. There is some inadmissible testimony in these depositions, but the error in admitting it was harmless.

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(4) The plaintiff here claims title under a tax deed made in 1823 by one Taylor, Designated Collector of the federal direct tax of 1816, to one Lamb. In addition to a contention that the court should on common law grounds presume the validity of this deed, which was overruled, the plaintiff relied upon the Virginia Act of March 13, 1912 (Acts 1912, p. 524). This statute reads: "Chap. 235.—An Act to prescribe the effect as evidence to be given to deeds recorded prior to the year 1865. Approved March 13, 1912. 1. Be it enacted by the general assembly of Virginia, That in every action at law or suit in equity, in which it shall appear that a deed or other writing which constitutes a part of the chain of title to any lands has been made by an officer or other person, purporting to act under the provisions of any statute or decree, authorizing or providing for a sale or conveyance of real estate, and that said deed was duly recorded in the proper clerk's office prior to the year eighteen hundred and sixty-five, and that the record or evidence, or some parts thereof of the proceedings under or pursuant to which such sale, deed or other writing was made, has been lost or destroyed, or can not be produced, the said deed or other writing, or a certified copy thereof, taken from said record, shall be prima facie evidence of the fact that all provisions and requirements of such statute or decree were duly complied with in the making of such sale, deed or other writing as well as the power or authority of such officer or other person to make and execute the same, and of the due execution thereof by him." This statute was repealed by the Act of March 14, 1914, (Acts 1914, p. 186) which reads: "Be it enacted by the general assembly of Virginia, That an act entitled an act to prescribe the effect as evidence to be given to deeds recorded prior to the year eighteen hundred and sixty-five, approved March thirteenth, nineteen hundred and twelve, be and the same is hereby repealed." The plaintiff purchased the land in controversy from the Buchanan Company while the act of 1912 was still in force.

The plaintiff earnestly contends that by force of section 6. Code 1904, the Act of 1914 should be so construed as to leave to the plaintiff a right to rely upon the Act of 1912. Section 6 of the Code reads as follows: "No new law shall be construed to repeal a former law, as to any offense committed against the former law, or as to any act done, any penalty, forfeiture, or punishment incurred, or any right accrued, or claim arising under the former law, or in any way whatever to affect any such offense or act so committed or done, or any penalty, forfeiture, or punishment so incurred, or any right accrued or claim arising before the new law takes effect; save only that the

proceedings thereafter had shall conform, so far as practicable, to the laws in force at the time of such proceedings; and if any penalty, forfeiture, or punishment be mitigated by any provision of the new law, such provision may, with the consent of the party affected, be applied to any judgment pronounced after the new law takes effect."

This section of the Code applies only when the repealing statute is open to construction, that is, when there is some ambiguity or doubt as to the intent of the law makers in enacting the repealing statute. As was said in Hamilton *v.* Rathbone, 175 U. S. 414, 421,— "* * * the province of construction lies wholly within the domain of ambiguity." In Lake County *v.* Rollins, 130 U. S. 662, 670-1, it is said: "Where a law is expressed in plain and unambiguous terms, * * * the Legislature should be intended to mean what they have plainly expressed and consequently no room is left for construction." In Great Northern R. Co. *v.* U. S., 208 U. S. 452, 466, in regard to section 13 U. S. Rev. Stats. it is said: "As the section of the Revised Statutes in question has only the force of a statute, its provisions can not justify a disregard of the will of Congress as manifested either expressly or by necessary implication in a subsequent enactment." In 36 Cyc. 1231 it is said that general saving statutes are applicable—"unless such application is negatived by the express terms or clear implication of a particular repealing act." In Danville *v.* Pace, 25 Gratt, 1, 6, in which this section (which was sec. 18, Ch. 16, Code 1860) was under consideration, it is said: "In construing this section, it is necessary to consider also the preceding one, which provides that this rule of construction shall not be adopted, if it would be inconsistent with the manifest intention of the legislature. In other words, the two sections taken together mean no more than that a new law shall not be construed to affect any right accrued under a former law, unless such is the manifest purpose of the legislature."

The first question therefore is whether or not the Act of 1914 is capable of more than one construction. The Act of 1912 provided a new mode of procedure, was prospective in operation, and applied to *all* trials thereafter to be held. To wholly repeal this mode of procedure was to restore the common law rule of evidence as to *all* cases thereafter to be tried. And this seems to me to be necessarily so because the generality of the language employed conveys and admits of no other meaning.

Again, the Act of 1912, assuming its constitutionality, is revolutionary and extreme. It is not improbable that the legislature in enacting it intended only to validate deeds made by commissioners in chancery, prior to 1863, where the court order

books and case files containing the decrees authorizing such deeds had been lost or destroyed. Many of the state court records were lost or destroyed during the Civil War. In many such cases it would be impossible to prove by direct evidence that there ever had been in existence any decree authorizing the deed. Hence the manifest intent was that mere inability to produce such decrees should throw the burden of proof on the party claiming against such deeds. The expression "*or* can not be produced," was therefore intended as it was written and can not properly be read "lost or destroyed *and* [*therefore*] can not be produced." Even as applicable solely to masters' deeds, because of the presumption of validity where there has been long possession under such deed, the policy of the statute was open to just criticism.

However, the language of the statute, possibly as a mere result of careless draftsmanship, is such that it applies also to ancient tax deeds. It therefore introduced a rule of evidence which threw doubt upon the validity of probably thousands of titles theretofore considered as impregnable, and created fear of an unprecedented flood of litigation. When this surprising and very grave defect in the Act of 1912 was, at its next session, called to the attention of the same legislature which enacted it, the statute was repealed. Can we take the position that the intent shown by the repealing statute is not, at least by necessary implication, to wholly abolish the privilege given by the Act of 1912 in all cases thereafter to be tried? With the limited library facilities at my command I have not been able to find any decision in which the facts are like the facts here. The old law in express terms applied to "every action at law or suit in equity." An absolute repeal, an unlimited annullment, of such law would seem therefore to be by necessary implication the exact aquivalent of a statute reading, "In no action at law or suit in equity" etc.

This conclusion is strengthened by the want of any sufficient reason for imputing a different intent to the legislature in enacting the repealing statute. Is there any reason for an intent to save to those who may have purchased ancient tax titles to land during the existence of the Act of 1912 the privilege conferred by that Act? Certainly the rule of evidence created by the Act of 1912 was impolitic and unwise. It was to protect the great number of citizens holding or claiming land adversely to ancient official deeds that the repealing statute was enacted. This purpose would have been very imperfectly realized, if there was also an intent to leave the Act of 1912 in full force as to all who acquired claim of title during the existence of that statute.

And there is also want of reason for any intent to favor

those who acquired claim of title under an ancient official deed while the Act of 1912 was in force. I so say because no one has in any strict sense a right to a particular mode of procedure. The privilege unwisely and injudiciously conferred by the Act of 1912 was completely within the control of the legislature. Whoever bought a claim to land founded on an ancient official deed must be considered as having bought with full knowledge that the law makers might percieve the injustice of the Act of 1912 and abolish the privilege before he could take advantage of it. He acquired no legal or moral right to such privilege so long as it remained wholly inchoate and hence there was no reason for the existence of an intent in 1914 to exclude such persons from the operation of the repealing statute.

It is contended by counsel for the plaintiff that the legislature in 1914 enacted the repealing statute not only with full knowledge of section 6 of the Code, but with the expectation that the courts would construe the repeal by reading section 6 as a proviso thereto. If section 6 saves the benefit of the act of 1912 to those who acquired claims under ancient official deeds while that statute was in force, although their titles were still unadjudicated when the repeal took effect, it also saves the same benefit of those who acquired claims of title to land under such deeds prior to the enactment of the statute of 1912 and who still hold such unadjudicated claims of title. Every reason for holding that section 6 applies to the first class also leads to the same conclusion as to the second class If the first class have a claim arising under the old law, so have the second class. If section 6 saves a wholly inchoate, executory, "right" to a particular mode of judicial procude to all of the first class, it necessarily saves this same "right" to the second class. If, therefore, the intent of the legislature in enacting the repealing statute in 1914 was that section 6 would be read as a proviso to the repeal and that it would save the benefit of the Act of 1914 to all except those who might acquire title after the repeal went into effect, the repealing act was, while not entirely futile, intended to be futile in every large measure. Practically every possible claim of title founded on an official deed *recorded prior to* 1865 was of course in existence and owned by some one in 1914. To so repeal the Act of 1912 that the repeal should apply only to those acquiring claims under these ancient deeds after the repeal was to accomplish in very small part the result that was desired by thousands of citizens. After the repeal went into effect claims to land under ancient official deeds, the evidences of the validity of which could not be produced and under which there had not been the long continued possession or other facts necessary to create a common law presumption of validity, would become practically unmarketable. Consequently the junior title holders,

for whose benefit the repeal was enacted, were given no relief except against a class of claimants who would, practically speaking, not come into existence for a long course of years. And where, as in the case at bar, a claim under an ancient official deed was acquired by a corporation having perpetual existence, the benefit of the Act of 1912 was saved to a practically unending succession of new stockholders. I am therefore unable to concede that the legislature in 1914 intended or expected that section 6 would be read as a proviso to the Act of 1914.

Counsel for plaintiff rely strongly upon the following excerpt from Phillips *v.* Commonwealth, 19 Gratt, 485, 524, relating to what is now section 6:— "It was designed to meet contingencies ensuing upon repeals, and superseded the necessity for future legislatures undertaking to prescribe or limit the operating of repealing laws. After its adoption in the Code, it was thenceforth to be taken as a part and limitation of every repealing statute, as much so as if it had been therein re-enacted, unless, indeed, a contrary intent should appear from the statute itself. We are therefore bound to construe the operation of this repeal as governed by this prescribed rule of construction. It will be found in chapter xvi., § 18, p. 115, under the head of 'Construction of Statutes.'" I can not possibly read this as holding that section 6 must be read as a proviso to every repealing statute. The last clause is expressly to the contrary. And without such saving the rule laid down would have been contrary to all authority and reason.

Again, the mere fact, if it be a fact, that the language of section 6 is such that it could apply to the repealing statute here in question, is no sufficient reason for reading it as a proviso to the Act of 1914. The intent of the legislature of the year 1914 necessarily prevails over the intent of the earlier legislatures which enacted and retained section 6. However, I am not satisfied that section 6 shows an intent that it should be applied to a case where the repealed statutes provides only a mode of procedure, the right to which had not accrued at the time the repeal went into effect. I concede that section 6 is applicable to a statute repealing one creating a mode of procedure which has been partly executed when the new law goes into effect, as in Phillips *v.* Commonwealth, supra, 19 Gratt. 485. In that case the prosecution had been commenced before the new law of procedure went into effect. The first examining trial was held prior to July 1st, 1867. The defendant as well as the Commonwealth had therefore before the new law become effective acquired a right to the old mode of proceeding. Phillips' case could be an authority against my reasoning only if the prosecution there had been commenced after the new law went into effect. Under the facts

the right to the old procedure *had accrued* before the new law went into affect.

However, I do not hold that section 6 saves only accrued rights. "Claims arising under the old law" must I think embrace inchoate rights. But that which is saved must be a claim to a right.—although an inchoate right—and no one can be said to have an entirely *inchoate right* to a particular mode of procedure. A statute which provides a mere mode of procedure does not give any one a right, in the strict sense of the word, to that particular mode unless he avails himself of it while the statute is in force. The only inchoate rights saved by section 6 are I think inchoate *substantive* rights. Reading section 6 as intended to save only accrued procedural rights and both accrued, and inchoate, substantive rights, seems to give it the full operation intended and to be in accord with all of the Virginia decisions. I can see no reason for an intent in enacting section 6 to save to any one any particular mode of proceeding, if inchoate and unaccrued at the time the legislature substitutes therefor some other mode of judicial proceeding. The very reason for substituting another mode of proceeding is that the repealed mode has been found unfair or inexpedient. Where the repealed statute gave substantive rights, even inchoate rights, or gave mere procedural rights which had accrued when the repealing statute takes effect, there is a probability of hardship resulting. Hence an intent that a repeal should not affect such rights. But no such reason exists where the repealed law affords an inchoate, unaccrued, unexecuted privilege to rely upon some particular mode of procedure. There is no hardship in substituting for an unfair or unwise mode of procedure another mode which is fairer and wiser.

The only satisfactory conclusion I can reach is that the Act of 1914 wholly abolished the Act of 1912 in the case at bar.

(5) CONSTITUTIONALITY OF THE ACT OF 1914.

It is contended by the plaintiff that the Act of 1914, if read as an absolute repeal of the Act 1912, is unconstitutional.

I am unable to see that the statute impairs the obligation of any contract by or under which the plaintiff claims. Every contract, with one exception, in the plaintiff's chain of title was made prior to 1912 and while the common law rule of evidence was in force. The only possible exception is the contract between plaintiff and the Buchanan Company. The conveyances were made in 1913 and in April 1914—before the Act of 1914 went into effect. Sec. 53 Const. Va. Granting that the Act of 1914 reduced the value of the Buchanan Company's title, the statute did not in any sense impair the *obligation* of the contract. In order that a state statute may impair the obligation of a

contract, the statute must affect the validity, construction, discharge, or enforcement of the contract. It seems to me clear that the Act of 1914 is absolutely without effect in any one of these particulars. See Curtis *v.* Whitney, 13 Wall. 68, 70-1; R. Co. *v.* Maguire, 20 Wall. 46, 61; Ochiltree *v.* R. Co., 21 Wall. 249, 253; Edwards *v.* Kearzey, 96 U. S. 595, 607; Wolfe *v.* New Orleans, 103 U. S. 358, 365; Insc. Co. *v.* Cushman, 108 U. S. 51, 65.

Does the Act of 1914 deprive of property without due process of law?

The authorities fully sustain the position that these is no want of due process of law in the enactment of a reasonable rule of evidence. In R. Co. *v.* Turnipseed, 219 U. S. 35, 43, it is said: "If a legislative provision not unreasonable in itself prescribing a rule of evidence, in either criminal or civil cases, does not shut out from the party affected a reasonable opportunity to submit to the jury in his defense all of the facts bearing upon the issue, there is no ground for holding that due process of law has been denied him."

The Act of 1914 simply restored a common law rule of evidence which had come to be a rule because the highest court of this state, not to mention the highest courts of the nation and of the great majority of the other states, had for generations considered it fairer and more politic than any other rule. It is surely impossible to say that such a rule is an unreasonable one. On the other hand, the Act of 1912 created an impolitic and unwise rule of evidence. Certainly the reasonableness of the Act of 1912 is much more open to question that is that of the Act of 1914. The following authorities seem to me to make it necessary to hold, and I do hold, that the Act of 1914 is not Fong *v.* U. S., 149 U. S. 698, 729; Li Sing *v.* U. S., 180 U. New Orleans, 103 U. S. 358, 365; Insc. *v.* Cushman, 108 U. S. S. 486, 493; Ewall *v.* Daggs, 108 U. S. 143, 150, 151; Marx *v.* Hanthorn, 148 U. S. 172; 181; Hawkins *v.* Bleakley, 37 Sup. Ct. 255; Campbell *v.* Iron Co., 83 Fed. 643; 37 Cyc. 1459; 8 Cyc. 896, 925; Cooley Const. Lim. (7th Ed.) 524-5; Gage *v.* Caroker, 125 Ill. 447, 17 N. E. 777, 779; Burk *v.* Putnam, 86 Am. St. 372, 84 N. W. 1053; People *v.* Cannon, 36 Am. St. 668, 682-4; O'-Bryan *v.* Allen, 32 Am. St. 595, 596; People *v.* Turner, 15 Am. St. 498, 501; Irwin *v.* Pierro (Minn.) 47 N. W. 154. But if there is even a doubt, it is the duty of the court to hold the statute to be valid. Dartmouth College *v.* Woodward, 4 Wheat. 578, 625; Ogden *v.* Saunders, 12 Wheat. 213, 270; Von Hoffman *v.* City, 4 Wall. 535, 549; The Mayor *v.* Cooper, 6 Wall. 247, 251; Sinking Fund Cases, 99 U. S. 700, 718; Hooper *v.* California, 155 U. S. 648, 657; Fairbank *v.* U. S., 181 U. S. 283, 285.

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(6) The defendant, inter alia, relied upon the defense of adversary possession. Using the expression "actual possession" as meaning a visible possession, resulting from a series of physical acts, which have noticeably changed the land from its state of nature, and the expression "constructive possession" as meaning an invisible, unreal possession, which must always be connected with, and founded upon, a partial actual possession, the facts as to the possession were as follows: The defendant's predecessor in title, Ratliff, acquired color of title long prior to the Civil War to two small adjoining tracts of land, which were in large part taken into and kept in unbroken, notorious, actual possession from about 1852 until 1896. The two tracts are over a mile from the land in controversy, which was never in actual possession. Ratliff obtained a grant from the Commonwealth of the tract in controversy May 1st, 1861. This tract adjoins another tract granted by the Commonwealth to Ratliff August 1st, 1862 which in turn adjoins a tract, granted by the Commonwealth to Ratliff in 1861, which adjoins and impinges upon the two tracts which Ratliff had in actual possession. There has never been any actual possession of the tract in controversy or of either of the two tracts which serve to connect the tract in controversy with the two tracts which were kept in actual possession.

The doctrine of constructive possession of contiguous tracts, claimed under color of title, is laid down in Overton *v.* Davisson, 1 Gratt. 211, at pp. 213, 216, 224. In Va. Co. *v.* Fields, 94 Va. 102, at pp. 106-7, and bottom of page 115, it is affirmed, as it also is in Roller *v.* Armentrout, 118 Va. 173, 177. In Hot Springs Co. *v.* Sterrett, 108 Va. 710, at pp. 712 and 713, and in Harman *v.* Ratliff, 93 Va. 249, 255, it is recognized. See also Sharp *v.* Shenandoah Co., 100 Va. 27, at pp. 34-36; Merryman *v.* Hoover, 107 Va. 485, 492, 502; Garrett *v.* Ramsey, 26 W. Va. 345, 370; State *v.* Harman, 57 W. Va. 447, 50 S. E. 828, 835; Simmons Co. *v.* Doran, 142 U. S. 417, 443; Braxton *v.* Rich, 47 Fed. 178, 180; Rich *v.* Braxton, 158 U. S. 375, 384; Hutchinson Land Titles, §416.

Harman *v.* Ratliff, 93 Va. 249, 255-6, supra, without close attention to the facts might be misleading. At pp. 250-1 are set out the titles claimed by Silas Ratliff in that case. They do not include his home tract. The key to the opinion—a fact which should have been stated in the report—is that Silas Ratliff's home tract was outside of the Harman & Bender patent. The record, sent me by the clerk at Wytheville, rather clearly indicated that only the 14 acres, the 465 acres and the 1080 acres impinged on plaintiff's boundary. Both Judge Coulling and Mr. Finney of counsel in that case, have written me that Silas Rat-

liff's home tract was outside of the Harman tract. In the brief for the plaintiff in error, signed by the late Judge Jno. H. Fulton, it is said:—"The defendant [Ratcliff] owned a tract that adjoined the plaintiff on the east called the 640 acre tract. This does *not include any of the land in controversy*. It is called the home tract (presumably). He lived upon it." There is nothing to the contrary in the opposing brief.

In the case at bar the junior claimant, Ratliff, before the Civil War took actual possession of a part of the tract conveyed to him by Gibson, as well as of the 15 acre tract. The Gibson tract lies, as do the other tracts to be mentioned, wholly within the Smyth & Banks patent. The 15 acre patent to Ratliff (whose name is also spelled Ratcliff) was issued in 1854. In 1861 Ratliff got a patent for the 595 acres which adjoins the 15 acres and the Gibson tract. In 1861 he also obtained a patent for the 673 acres (the land in controversy) which did not then adjoin any of Ratliff's other tracts. In 1862 (Aug. 1st) Ratliff obtained the 163 acre patent, which adjoins the 673 acres and the 595 acres, and then the land in controversy became a part of a chain of contiguous tracts. If any one in plaintiff's chain of title ever had any actual possession of any part of the 200,000 acre tract, such possession had been abandoned long prior to 1862, and was never afterwards resumed. The doctrine here relied upon by the defendant does not greatly commend itself to my mind, but I am unable to satisfactorily distinguish the case at bar from Overton *v.* Davisson, supra. In that case Davisson's actual possession (which was commenced before the emanation of either grant and was confined to a part of a tract of 400 acres, granted to Davisson on *January 3rd,* 1787) was held to extend to Davisson's constructive possession over another adjoining tract of 800 acres granted to him on *January 23rd,* 1787. If a constructive possession can arise after an interval of twenty days, it may also arise after an interval of one or of several years. There is no time at which a line of demarcation can be drawn. Hence, although the interval of time is longer here than in Overton *v.* Davisson, the principle there laid down seems necessarily to apply here; unless it be because the land in controversy does not immediately adjoin either of the two tracts of which Ratliff had a partial actual possession. In this respect this case differs from Overton *v.* Davisson. But I am unable to see any sufficient reason for limiting the doctrine to an immediately adjoining tract. The principle on which the doctrine is founded is that an actual possession within the interlock by a colorable title holder gives to the true title holder notice of an adverse claim, and he must at his peril sue before the period of limitation runs. It can make no difference to the senior that the junior's colorable titles were acquired at different

times. All contiguous tracts constitute one parcel, so far as the senior title holder is concerned. After August 1st, 1862, Ratliff was in the actual possession of a part of what was in effect one large boundary, shown by the exterior lines on the trial map. In Overton *v.* Davisson, 1 Gratt. 216, 229, it is said: "And, moreover, that upon the question of adversary possession, it is immaterial whether the land in controversy be embraced by one or several coterminous grants of the older patentee, or one or several coterminous grants of the younger patentee; in either case the lands granted to the same person by several patents must be regarded as forming one entire tract."

As has been shown, Ratliff's constructive possession of the tract in controversy commenced on August 1st, 1862 (the date when the land in controversy became one of the several adjoining tracts); but at that time the Stay Law was in force. (§ 2919 Code 1904; 4 Minor's Insts. 624). It was not until January 1st, 1869, that Ratliff's possession could start the running of the statute of limitation. The ten years of adverse possession necessary to bar the senior title holder could not have run until January 1st, 1879. In 1876 Pearson failed to pay the taxes assessed against him on the 200,000 acre tract. It is contended in behalf of the plaintiff that the statute of limitations ceased to run on January 1st, 1876, and did not commence to run again until the tax deed was made by Dennis, Clerk, to the Buchanan Company. This contention is founded on sec. 661 Code 1904: "*Sec.* 661. *When deed made: what is invested in grantee; how defeated: when title of remainderman not divested my sale.* When the purchasers of any real estate sold as aforesaid or sold in pursuance of section six hundred and sixty-six, his heirs or assigns, has obtained a deed therefor, and the same has been duly admitted to record in the county or corporation in which such real estate lies, *the right or title to such real estate shall stand vested in the grantee in such deed as it was vested in the party assessed with the taxes* or levies on account whereof the sale was made, *at the commencement of the year for which said taxes or levies were assessed;* or, in any person claiming under such party," etc.

I concede that from the date of the purchase by the Commonwealth (Oct. 12, 1886) until the deed was made to the Buchanan Company the possession of Ratliff and his successors did not count. Smith *v.* Chapman, 10 Gratt. 445, 464.

The exact question here presented does not seem to have ever been decided by the Virginia Court of Appeals. In Thomas *v.* Jones, 94 Va. 756, 759 (where it was contended that the purchaser of the tax title took subject to a vendor's lien in favor of the delinquent's grantor) the court said: "The provision in sec. 661 of the Code, that 'the right or title to such estate shall stand vested in the grantee in such deed as it was vested in the party

assessed with the taxes or levies on account whereof the sale was made.' refers to the character of the title that shall be vested in the grantee in such deed, *whether it be a fee simple or otherwise*. It has no reference to liens, and does not mean, as contended, that the purchaser takes the land subject to the liens resting thereon at the time the taxes are assessed." In Stevenson *v.* Henkle, 100 Va. 591, 598, (where it was contended that a deed of trust made by the land owner prior to the assessment of taxes for which the land was subsequently sold was paramount to the tax lien) the language used in Thomas *v.* Jones, supra, is again used.

While the question is not entirely free from difficulty, I believe that the language of the statute means no more than that the grantee in the tax deed shall have the estate that was vested in the delinquent former owner. Without going further back than the tax statutes collected in the Code of 1819, it will be advisable to note the genesis of the language used in the statute in force when the land was conveyed to the Buchanan Company. In the Act of January 7, 1788, (2 Code 1819, p. 512) it is provided that the sheriff's deed "shall be effectual for passing to the purchaser *all the estate and interest which the debtor had* and might lawfully part with in the lands." In another Act of the same date (ibid p. 515), in providing for redemption after purchase by the tax commissioner for the public, it is provided that the person who was originally chargeable with the land tax —"may discharge the same, and be entitled to all the *estate he held* in such land in as full and ample a manner as if the said sale had never been made." In the Act of Nov. 30, 1792, (ibid 522) the deed—"shall be effectual for passing to the purchaser *all the estate and interest which the debtor had,* and might lawfully part with * * * ." In the Act of February 14, 1811, (ibid p. 536) is the following: "* * * no forfeiture of any lands occasioned by the failure of *any tenant for life* to pay the taxes due thereon shall *operate on any other estate except that of such tenant for life,* unless such estate be found to be insufficient to pay the arrears of taxes due thereon." In the Act of February 9, 1814, (ibid 551) it is provided: "37. The sales made as aforesaid, and the titles vested in the literary fund as aforesaid, shall give to the purchaser, or to the literary fund, as the case may be, only such estate and such right, as, at the time when such land or lot was returned delinquent, *was vested in the person in whose name it was returned, his heir, devisee, or other person claiming by, through or under him;* save only, that all use, trust and equity of redemption, shall be extinguished by such sale or vesting in the literary fund." In the Act of March 10, 1832, (Acts 1831-2, p. 64) it is provided: "20. All sales of lands and lots, made in pursuance of this act, and not

redeemed within the period aforesaid, shall be good and effectual in law, for *passing such estate only as shall be vested in the persons charged with the* taxes, for the non-payment whereof such sale shall be made." In so far as we are now concerned, the language of the present statute is identical with that in 1 Code 1849, p. 204; Code 1860, p. 221; Code 1873, p. 385, and Code 1887, sec. 661. Throughout this long course of legislation it seems rather clear that the intent has always been that a tax purchaser should obtain *such estate in the land* as the delinquent had, rather than to provide a shield against adversary possession held by a stranger to the delinquent tax payer.

Again, if the intent was that a delinquency, followed by a sale and deed to a tax purchaser, should stop the running of the statute of limitations at the date of the delinquency, the language chosen is ill-adapted to express such intent. While adversary possession of real estate may defeat the right or title of a delinquent tax payer, it is not a part of such right or title. If the intent was to shield the tax purchaser against an adversary possession which had not ripened at the commencement of the year of the delinquency, the legislature would have said that the purchaser should have the title of the delinquent owner, *with every right of action* which he had on the first day of the year of the first delinquency. It is true that on January 1st, 1876, Pearson had an unbarred right of action against Ratliff which his successors in interest, if my conclusion is sound, have not. But the words "right or title" in the statute mean here the paper title which Pearson had on that date, and this has been passed on to the plaintiff.

Again, Pearson could have sued Ratliff in ejectment, free from the defense of adversary possession, at any time from January 1st, 1876, until January 1st, 1879. I can think of no very good reason for assuming a legislative intent to give to a purchaser who stands in Pearson's shoes an exemption from Pearson's negligence, or to visit punishment on a stranger who was not to blame for Pearson's delinquency. It is true that it would make tax titles more salable if the statute means what plaintiff's counsel contend that it means. But such legislation would operate most harshly on actual settlers and would be inherently unjust in that it would make an innocent stranger in adverse possession (and presumably also taxed on the land he claims) suffer for the delinquency of the senior title holder. Neither an intent to discourage actual settlement of the thinly inhabited mountain sections of this state, nor an intent to visit punishment for one man's sins on another can well be derived from the language of the statute. (1 Fed. Stats. Ann. LV).

Another reason for rejecting the construction advocated by plaintiff's counsel—and one of very considerable force—is

found in this fact: In none of the very numerous cases reported in this state, in which plaintiffs have relied upon tax titles, has this contention, so far as I have discovered, ever been made.

I have said that the plaintiff here stands in the shoes of Pearson. Under statutes such as those of this state the title of the tax purchaser is a derivative title. McDonald *v.* Hannah, 51 Fed. 73, 74; Hannah *v.* McDonald, 59 Fed. 977, 980. See Blackwell Tax Titles (1st Ed.) §§ 232-3, p. 548: "Where the law requires the land to be listed in the name of the owner of the fee or of any other interest in the estate, provides for a personal demand of the tax, and, in case of default, authorizes the seizure of the body or goods of the delinquent in satisfaction of the tax, and in terms or upon a fair construction of the law, permits a sale of the land only when all other remedies have exhausted, then the sale and conveyance by the officer passes only the interest of him in whose name it was listed, upon whom the demand was made, who had notice of the proceedings, and who alone can be regarded as legally delinquent. In such case *the title is a derivative one,* and the tax purchaser can recover in ejectment only such interest as he may prove to have been vested in the defaulter at the time of the assessment." If the contention of the plaintiff be upheld, we must construe section 661 as being in conflict with section 2915—the statute of limitation. "No person shall * * * bring an action to recover any land lying west of the Alleghany mountains but within ten years next after the time at which the right * * * to bring such action shall have first accrued to *himself or to some person through whom he claims.*" But if section 661 be construed as the defendant contends this conflict is avoided, and this fact affords a reason of some weight for adopting the construction of section 661 above chosen. 36 Cyc. p. 1146; 26 Am. & Eng. Encyc. 616-17-18; Black Interp. Law (1st Ed.) p. 17, 60-61; 1 Fed. Stats. Ann. XCIII, 31-b; Sutherland Stat. Constr. (1st Ed.) § 288.

Counsel for plaintiff build up a somewhat plausible argument on the decisions holding that the state's lien for taxes is a paramount lien. It is true that Pearson could not have encumbered the land by any lien, even to the suffering of a judgment lien, either before or after the first of January, 1876, which would not have been subordinate to the tax lien and which would not have been extinguished by the tax sale. It is also true that a sale, or devise of the land by Pearson, or a transmission of his title by descent, after the said date could not affect the validity of the tax sale. But it does not follow that the ripening of Ratliff's title by adversary possession is also nullified by the tax sale. The difference is that all such lienors, vendees, de-

visees or heirs acquire their rights through and under Pearson. Ratliff acquired his right in opposition to Pearson. Any one who acquired a lien on the land from Pearson's predecessors in title, and any one who acquired a lien on or the ownership of the land from or under Pearson, are his privies in title. Ratliff is a stranger to the Pearson title.

Counsel ask what would have been the result if the tax sale had been held on January 2nd, 1879. I think the answer is that the state would in such event have offered a wholly worthless tax title for sale. It is perfectly true that, if the Pearson title was in 1876 a valid title, by assessing him with the taxes for that year the state acquired a valid and valuable lien on the land. But there is certainly no Virginia decision, so far as I know, which holds that delay in foreclosing this lien, accompanied by the ripening of an adverse possession of the land by a stranger to the tax payer, may not make the lien valueless. And I can see no reason why the result should be otherwise. If the position I take be sound, it is entirely true that a well advised proposing tax purchaser would not buy at a tax sale, where an adverse title had ripened before the tax sale is held, or will ripen so soon after the tax sale that suit can not be instituted before the adverse title ripens. And it follows that the tax lien is, or may be, in such case valueless. But such should in reason and justice be the result. The law does not provide that a purchaser at a tax sale shall get every one's title to the land sold, but only the title of the person assessed and of those claiming in privity with him. It does not provide for a forfeiture of the rights of strangers, also claiming the land, because the adverse claimant should be, and in practically all cases is, also assessed with taxes levied on the same land.

This conclusion finds some support in Reusens *v.* Lawson, 91 Va. 226, 244; 1 Cyc. 1018; 2 Corp. Jur. 108; Jordan *v.* Higgins, 63 Tex. 150; Sellers *v.* Simpson, 53 Texas C. A. 205, 115 S. W. 888. See, contra, Monroe *v.* Morris, 7 Ohio 262.

If the defendant's title to the land in controversy had been lost by failure to pay the taxes assessed against him or his predecessors in title, the plaintiff would assuredly have introduced evidence of such fact. As there was no such evidence, it seems a reasonable conclusion that Ratliff and his successors have always paid the taxes on the land in controversy. If so, it would be difficult to conceive of greater injustice than that the defendant should lose the land claimed by him, not because Pearson has a better title to it, but because *Pearson* failed to pay the taxes assessed against Pearson on the same land.

It follows that the statute of limitations affords in itself a sufficient reason for rendering judgment for the defendant.